No. 76-1005

In the Supreme Court of the United States

OCTOBER TERM, 1976

LARRY PRESSLER, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

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CITATIONS

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of the Secretary of the Treasury, moves to affirm the judgment of the district court.

OPINION BELOW

The *per curiam* opinion of the district court (J.S. App. 1a–8a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on October 12, 1976. A notice of appeal to

this Court (J.S. App. 9a–10a) was filed on October 22, 1976. On December 16, 1976, the Chief Justice extended the time for docketing the appeal to and including January 20, 1977. The jurisdictional statement was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether certain of the procedures contained in the Postal Revenue and Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act of 1975, which govern the setting of new rates of compensation for members of Congress, are constitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1, of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6, of the Constitution provides in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. * * *

Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351–361, is set forth at J.S. App. 11a–16a. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94–82, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, is set forth in pertinent part at J.S. 3–4.

STATEMENT

Appellant, a member of the House of Representatives since 1975 (see J.S. App. 1a), challenges in this action the constitutionality of certain of the statutory provisions by which the salaries of Senators and Representatives are determined. The first of these provisions, Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351–361 ("Salary Act"), established a Commission on Executive, Legislative, and Judicial Salaries ("Commission"), composed of nine members.[1] The Commission recommends to the President, once every four years, specific pay rates for Senators, Representatives, federal judges, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. 356, 357. After receiving the Commission's report, the President is required to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the purview of [the Salary Act]." 2 U.S.C. 358. The rates of pay recommended by the President become effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (1) Congress enacts a statute providing for rates of pay other than those the President has proposed or (2) either House of Congress "enact[s] legislation which specifically

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[1] Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House and the Chief Justice. 2 U.S.C. 352.

disapproves all or part of such recommendations * * *." 2 U.S.C. 359.

The Commission submitted its first quadrennial report to the President in December 1968. The Commission recommended in that report, *inter alia,* that congressional salaries be increased from $30,000 to $50,000 per annum. 115 Cong. Rec. 2690 (1969). After discussing the Commission's recommendations with congressional leaders, the President recommended in the budget he submitted to Congress on January 15, 1969, that congressional salaries be increased to $42,500 per annum. See 115 Cong. Rec. 2705 (1969). The Senate debated extensively a resolution (S. Res. 82, 91st Cong., 1st Sess. (1969)) disapproving all of the pay raises the President had proposed, but ultimately rejected the resolution by a vote of 47 to 34. 115 Cong. Rec. 2677–2716 (1969). A similar resolution was introduced in the House (H.R. Res. 133, 91st Cong., 1st Sess. (1969)) but was not reported out of committee. See 115 Cong. Rec. D40 (1969). The President's recommendations therefore became effective for the first pay period beginning after February 14, 1969. 34 Fed. Reg. 2241.

The Commission submitted its second report to the President in June 1973. The President thereafter proposed in the budget he submitted to Congress that the salaries of members of Congress be increased to $52,800 per annum over a three-year period. See H.R. Rep. 93–870, 93d Cong., 2d Sess. 3 (1974). The Senate Committee on Post Office and Civil Service reported a resolution (S. Res. 293, 93d Cong., 2d Sess. (1974)) disapproving this increase but approving the increases recommended by the President for all other officials covered by the Salary Act. The resolution was amended on the floor, however, and was passed in a form disapproving all of the salary adjustments the President had proposed.[2] 120 Cong. Rec. 5492–5508 (1974).[3]

The second statutory provision at issue is Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94–82, 89 Stat. 421, 2 U.S.C. (Supp. V) 31 ("Adjustment Act"). Prior to enactment of the Adjustment Act, members of Congress, federal judges, and certain other high-ranking government officials were excluded from the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.,* which authorizes annual cost-of-living adjustments to the salaries of federal employees governed by General Schedule ("GS") pay rates and other specified statutory pay systems. The Adjustment Act extended the provisions of the Federal Pay Comparability Act to these previously excluded government officials. Section 204(a) of the Adjustment Act, which deals specifically with congressional salaries, provides for annual adjustments computed

[2] A similar resolution disapproving the salary increases proposed by the President was introduced in the House (H.R. Res. 807, 93d Cong., 2d Sess. (1974)) and was reported out of committee. No further action was taken on the resolution, however, because of passage of the Senate resolution disapproving the proposed salary increases.

[3] The validity of the Senate's action is at issue in *Atkins* v. *United States*, Ct. Cl., Nos. 41–76, 132–76, and 357–76 (judges' pay), and *McCorkle* v. *United States*, C.A. 4, No. 76–1479 (civil servants' pay).

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by reference to the annual cost-of-living increases given employees subject to the GS pay system.

The amount of annual salary adjustments authorized under the Federal Pay Comparability Act is determined in accordance with the detailed standards prescribed at 5 U.S.C. (and Supp. V) 5305(a) and (b). But if the President concludes that a national emergency or economic conditions affecting the general welfare make such adjustments inappropriate, he may submit an alternative adjustment plan to Congress before September 1 of the year in which the adjustment is scheduled to become effective. 5 U.S.C. (Supp. V) 5305(c)(1). The cost-of-living increases proposed in the alternative plan become effective unless the plan is disapproved by resolution of either House of Congress, in which event the adjustments originally computed become effective. 5 U.S.C. 5305 (c)(2) and (m). See *National Treasury Employees Union* v. *Nixon,* 492 F. 2d 587 (C.A.D.C.).

On October 6, 1975, the President ordered cost-of-living adjustments averaging 4.94 percent to be made in the salaries of employees subject to the GS pay system. Executive Order 11883, 40 Fed. Reg. 47091. Those increases became effective on or shortly after October 1, 1975. At the same time, congressional salaries also were increased by 4.94 percent (from $42,500 to $44,600) pursuant to Section 204(a) of the Adjustment Act (40 Fed. Reg. 47099).

Appellant filed the present suit on May 7, 1976, seeking to enjoin any further increases in congressional salaries under either the Salary Act or the Adjustment Act. On October 12, 1976, a three-judge district court, convened pursuant to 28 U.S.C. 2282, dismissed the complaint (J.S. App. 1a–8a).[4] The district court held that appellant had standing as a congressman, but not as a citizen or taxpayer, to challenge the statutory procedures by which the salaries of members of Congress are determined. The court based that holding on appellant's allegation that his legislative vote "was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution" (J.S. App. 4a). But the court rejected appellant's position on the merits, holding that the Salary Act and the Adjustment Act satisfy the requirement of Article I, Section 6, of the Constitution that congressional salaries "be ascertained by Law" (J.S. App. 6a–8a).[5]

[4] On October 1, 1976, after the present suit had been filed but before the court had dismissed the complaint, the President announced that further cost-of-living adjustments averaging 4.83 percent would be implemented for the first pay period after October 1, 1976. Executive Order 11941, 41 Fed. Reg. 43889. Such adjustment would have increased congressional salaries to $46,800 per annum. The adjustment was not implemented, however, because Congress specifically refused to appropriate the necessary funds in the Legislative Branch Appropriation Act of 1977, Pub. L. 94–440, 90 Stat. 1439. See H.R. Conf. Rep. No. 94–1559, 94th Cong., 2d Sess. 3 (1976).

[5] On December 2, 1976, after the court had dismissed the complaint, the Commission submitted to the President its third quadrennial report under the Salary Act. The Commission's report recommended average salary increases of 36.4 percent for federal employees subject to the Salary Act, contingent upon the adoption

ARGUMENT

The district court correctly rejected appellant's contention that the Ascertainment Clause, Article I, Section 6, of the Constitution, requires the enactment of a statute prescribing specific dollar amounts of compensation for members of Congress. Accordingly, plenary review by this Court is not warranted. We submit, moreover, that appellant lacks standing to challenge the statutory provisions by which congressional salaries are determined and that such challenge presents a nonjusticiable political question.

1. The district court correctly rejected appellant's contention (see J.S. 16) that the only procedure that satisfies the requirement of Article I, Section 6, that congressional salaries be "ascertained by Law" is enactment of a statute prescribing a specific dollar amount that may be paid in compensation. As the district court pointed out, "[t]he Constitution is not to be parsed in the narrow, rigid, pedantic manner

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of a code of public conduct (1) requiring disclosure by certain officials of all outside sources of income, (2) restricting the nature and amounts of such income, (3) applying conflict-of-interest restrictions upon investments, (4) limiting expense allowances and (5) restricting the nature of post-government employment. In the budget submitted to Congress on January 17, 1977, the President recommended salary increases slightly lower than those the Commission had recommended. The President also endorsed the Commission's proposed code of conduct. 13 Weekly Comp. Pres. Docs. 50–51 (1977). Neither House of Congress disapproved the salary recommendations contained in the President's budget, and the increases accordingly became effective on February 20, 1977. By virtue of this latest increase, members of Congress currently are being paid at the rate of $57,500 per annum.

of a statute" (J.S. App. 8a). See *McCulloch* v. *Maryland,* 4 Wheat. 316, 407. In discussing the analogous Appropriations Clause, Article I, Section 9, clause 7, which requires "a regular Statement and Account of the Receipts and Expenditures of all public Money * * *," this Court stated that "Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest" (*United States* v. *Richardson,* 418 U.S. 166, 178 n. 11). The inflexible construction appellant advocates for the Ascertainment Clause is thus contrary to established principles for construing congressional powers under Article I.[6]

Indeed, Congress frequently controls the amount of compensation to be paid federal officers and employees by prescribing the standards and procedures to be used rather than by setting specific dollar

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[6] The validity of the provision of the Salary Act (2 U.S.C. 359) permitting a single House of Congress, acting alone, to disapprove a pay increase recommended by the President is at issue in two other pending cases. *Atkins* v. *United States*, *supra*, and *McCorkle* v. *United States*, *supra*. The validity of a similar "one-house veto" provision was discussed but not resolved in *Buckley* v. *Valeo*, 424 U.S. 1, 140 n. 176 (*per curiam*); compare *id. at* 284–285. (White, J., concurring in part and dissenting in part). In *Atkins* v. *United States*, *supra*, the government has argued that the one-house veto provision of the Salary Act is unconstitutional and is not severable from the remainder of that statute. But appellant has not challenged the one-house veto provision of the Salary Act; indeed, he argues that the procedures he has challenged are severable from the procedures at issue in *Atkins* (J.S. 22-23). Thus, this appeal does not present an appropriate vehicle for consideration by this Court of the validity of the one-house veto provision of the Salary Act.

amounts. Appellant does not contend, for example, that Article I requires Congress to do more than prescribe the procedures and standards to be used in determining the amount of the annual cost-of-living increase to be given employees subject to the GS pay system (5 U.S.C. (and Supp. V) 5305) (see J.S. 22), the amount of Civil Service retirement benefits (5 U.S.C. 8340), or the *per diem* rate for travel by government officials (5 U.S.C. (Supp. V) 5702). Similarly, the Tariff Act of 1930, 46 Stat. 590, as amended, 19 U.S.C. 1202, delegated to the Executive the task of setting specific rates to be charged for dutiable goods. Such examples demonstrate the flexibility accorded and frequently utilized by Congress under Article I of the Constitution in controlling both expenditures and revenues.

The fact that Congress has chosen in the Salary Act and the Adjustment Act to prescribe the procedures and standards by which congressional compensation is determined, but not to set specific dollar amounts, does not mean that such compensation is not "ascertained by Law." The history of the Ascertainment Clause reveals that the Framers intended only that congressional salaries be a matter of public record (see J.S. 13–15). The procedures challenged by appellant are fully consistent with the goal of public accountability. Congress remains accountable for compensation paid pursuant to statutes that it has enacted and can revise. In addition, Congress can refuse to appropriate funds for a salary increase authorized to be paid under either the Salary Act

or the Adjustment Act—a power that Congress exercised in 1976 (see note 4, *supra*). As the district court correctly concluded (J.S. App. 7a–8a):

> Congress continues to be responsible to the public for the level of pay its members receive. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phrase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which [appellant] seeks.

Appellant contends (J.S. 17, 19) that the procedures pursuant to which congressional salaries are determined are deficient because they do not provide him with an opportunity to record his vote for or against a proposed adjustment. Even if congressional salaries were adjusted in the manner appellant advocates, appellant's desire to have his vote recorded would not necessarily be respected. Article I, Section 5, clause 3, of the Constitution provides for recording the votes of the members of either House only "at the Desire of one fifth of those present * * *." Thus, as an individual legislator—the capacity in which appellant has pursued this action—appellant would not be assured under his view of the Ascertainment Clause

of an opportunity to inform his constituents of his position on a proposed pay increase by means of a recorded vote. Appellant could accomplish the same result, of course, by speaking out against any proposed pay increase. But he retains that right under the Salary Act and the Adjustment Act.

2. Dismissal of the complaint also was warranted because appellant lacks standing. Insofar as appellant has relied here upon his status as a citizen and taxpayer, appellant has asserted only a "generalized grievance[] about the conduct of government * * *" (*Flast* v. *Cohen,* 392 U.S. 83, 106). That grievance, if any, is shared in substantially equal measure by all citizens and taxpayers, and is not a sufficient basis for appellant's invocation of the judicial process. *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa.) (three-judge court), affirmed, 401 U.S. 901; see *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208, 220; *United States* v. *Richardson, supra,* 418 U.S. at 173; *Ex parte Levitt,* 302 U.S. 633, 634; *Massachusetts* v. *Mellon,* 262 U.S. 447, 488; *Fairchild* v. *Hughes,* 258 U.S. 126, 129–130.

Appellant also lacks standing as a congressman. He has not alleged that the efficacy of any vote he has cast or may cast in the future has been nullified or diminished. Rather, he complains that under the Salary Act and the Adjustment Act congressional salaries can be adjusted without his casting a vote. If adjustments under those statutes during appellant's tenure as a congressman had reduced his compensation, appellant might be able to advance at least an arguable claim of concrete injury. But the two

adjustments to appellant's salary made during his tenure in office have increased the amount of compensation to which he is entitled;[7] consequently, his only plausible claim of injury is that governmental expenditures are being increased in an unconstitutional manner. Such a claim, without more, is too generalized to support appellant's standing (*e.g., United States* v. *Richardson, supra*), particularly since as a congressman appellant can vote upon the appropriations bills needed to implement any proposed salary increase for members of Congress.

In fact, appellant did vote with a majority of his colleagues in refusing to appropriate funds for the most recent cost-of-living increase authorized under the Adjustment Act. 122 Cong. Rec. H9365–H9375 (daily ed., September 1, 1976). The fact that appellant failed to muster sufficient support among his colleagues to block the two salary increases that have become effective during his tenure does not establish the existence of a judicially cognizable injury. See, *e.g., Harrington* v. *Bush,* C.A.D.C., No. 75–1862, de-

[7] In the past, appellant has donated part of his increased compensation to charity (see J.S. 22–23). But he has retained some of the increased compensation he has received under the statutes he challenges in this litigation (*ibid.*), and thus must ask this Court to violate the principle of " 'not pass[ing] upon the constitutionality of a statute at the instance of one who has availed himself of its benefits' " (*Fahey* v. *Mallonee*, 332 U.S. 245, 255, quoting from *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring)). Although this principle has been "applied unevenly in the past" (*Arnett* v. *Kennedy*, 416 U.S. 134, 153 (plurality opinion)), it nevertheless presents an additional obstacle to appellant's efforts to establish the existence of a personal injury in fact.

cided February 18, 1977; *Metcalf* v. *National Petroleum Council,* C.A.D.C., No. 76–1223, decided February 18, 1977;[8] *Harrington* v. *Schlesinger,* 528 F. 2d 455 (C.A. 4); *Korioth* v. *Briscoe,* 523 F. 2d 1271 (C.A. 5); *Holtzman* v. *Schlesinger,* 484 F. 2d 1307 (C.A. 2), certiorari denied, 416 U.S. 936.

3. Finally, dismissal of the complaint was warranted because the only issue presented is a nonjusticiable political question. The history of the Ascertainment Clause recounted by appellant (J.S. 13–15) confirms that congressional compensation is a matter committed in the Constitution to the Legislative Branch, subject to the check of public opinion. See *Baker* v. *Carr,* 369 U.S. 186, 217. As a member of the Legislative Branch, appellant has a continuing opportunity to have the views he seeks to advance in this litigation adopted through the political process.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1977.

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[8] Limiting *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C.), and *Kennedy* v. *Sampson*, 511 F. 2d 430 (C.A. D.C.).

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